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Ken Holdings Bhd & Ors v Sri Seltra Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22IP-58–10 OF 2011
HANIPAH FARIKULLAH J
12 FEBRUARY 2013

Land Law — Housing developers — Permits — Requirement of advertisement and sale permit — Approval of proposed advertising materials before publication — Failure to obtain approval for advertisements — Housing Developers (Control and Licensing) Regulations 1989

Tort — Defamation — Libel — Whether letter of enquiry sent to authorities may amount to defamation — Whether malice proven

Tort — Nuisance — Unlawful interference with trade — Criteria for establishing unlawful interference — Whether letter of enquiry sent to authorities may amount to unlawful interference

Tort — Passing off — Elements of passing off — Use of mark 'Ken City' by defendant for property development project — Whether amounted to passing of — Whether elements established

Trade Mark — Passing off — Damage — Whether actual damage must be proven — Whether damage may be presumed where parties engaged in common field of activity

Trade Mark — Passing off — Goodwill — Use of mark 'Ken City' by defendant for property development project — Whether common name may acquire secondary meaning and be distinctive — Whether plaintiffs acquired goodwill in mark — Whether confusion and deception proven — Whether plaintiff suffered or likely to suffer injury to business or goodwill — Whether actual confusion and actual damage need to be proven — Whether there was passing off

The first plaintiff was a holding company to a group of subsidiary companies including the second to the eighth plaintiffs in the construction and engineering business. The plaintiffs were known as the Ken Group Of Companies. The defendant companies were also involved in property

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development. Around June 2011, the defendants launched one of its development project called D'Pines@Ampang Project. The mark 'Ken City + Device (Corporate Logo)' was used in the promotional materials of D'Pines@Ampang Project including the advertisement in several newspapers. The first defendant had not obtained the necessary approval for the advertisement that was advertised in the newspapers and also for their banners and buntings. The plaintiffs thus filed the present suit on 5 October 2011 against the first defendant for passing off. Sometime in November 2011, the defendant started another project called Ken City Square@Ampang Project and used the mark 'Ken City' and another device in its advertisements in the form of banners, buntings, posters and billboard. The first defendant refuted the plaintiffs' claim and counterclaimed for defamation and unlawful interference. The plaintiffs contended that they had goodwill and reputation in the mark in the property development and construction sector due to their long continuous usage of the mark. The defendants however argued that the mark 'Ken' was a common word in the English language and hence no goodwill could arise out of it. The defendants' counterclaims for defamation and unlawful interference was in relation to letters written by the first plaintiff to the authorities namely, Jabatan Perumahan Negara ('JPN') and Majlis Perbandaran Ampang Jaya ('MPAJ'). The plaintiffs contended that the letters were merely letters of enquiries and it was written on an occasion of qualified privilege and the statements in the letters were true. The following issues arose to be tried: (i) whether the first defendant had obtained the necessary authorities' approval before advertising the mark 'Ken City'; (ii) whether the first defendant had committed passing off; and (iii) whether the plaintiffs were liable under defamation and unlawful interference for writing to the authorities.

Held, allowing the plaintiffs' claim and dismissing the defendants' counterclaim with costs:

(1) Before a developer can proceed to advertise its housing development project or sell the units, it is required to obtain an Advertisement and Sale Permit (AP). The Housing Development (Control and Licensing) Regulations 1989 also requires developers to submit their proposed advertising materials to the Ministry for approval before it can be published or displayed. The first defendant had not obtained approval for the advertisements that contained 'KEN CITY' (see paras 22–23 & 36).

(2) The classic form of misrepresentation giving rise to an action in passing off is a misrepresentation by the defendant that his goods are the goods of the plaintiffs. But that is no longer the only form of passing off. It is passing off to misrepresent that one's business as that of the plaintiffs, or connected with that of the plaintiffs, in any way likely to cause damage. If a trade name suggests that the defendant's business is an extension,

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branch or otherwise connected with the plaintiffs' business, the plaintiffs could have a remedy in passing off (see paras 66–67).

(3) It is possible for a common name to acquire a secondary meaning and be distinctive of the plaintiff eventhough it is the name of a person.It is possible for a descriptive name to acquire a secondary meaning if evidence of goodwill can be shown. The evidence showed that the plaintiffs commenced usage of the word 'KEN' as its project names for its property developments as early as 2000, which clearly preceded any use of the defendants in the property development sector. Through the extensive use of the mark 'KEN' by the plaintiffs, the public had associated the mark 'KEN' with the plaintiffs in the property development and construction sector and 'KEN' had acquired a secondary meaning which was distinctive of the plaintiffs (see paras 76, 82 & 89).

(4) In establishing that there was a misrepresentation arising from the wrongful association, the plaintiffs need not prove actual confusion. Mere proof of possibility of confusion is sufficient in a passing off action. The plaintiffs had sufficiently adduced evidence that the public associated the plaintiffs with the defendants. The plaintiffs and the defendants were competing in the same industry, namely the property development and construction sector. The plaintiffs had established evidence of confusion arising from the defendants used of the mark 'KEN' (see paras 97 & 103).

(5) If goods or services offered by both parties in a passing off action are in direct competition with one another, the court would readily infer the likelihood of damage to a claimant's goodwill. There is no need to prove actual damage. Both the plaintiffs and the first defendant were engaged in a common field of activity namely property development and construction. As such, the likelihood of damage to the plaintiff was readily inferred (see paras 110 & 112).

(6) Based on the evidence that the property market is a niche market where reputation of a developer is importance and fortified by the fact that the first defendant had a bad track record as a property developer in Malaysia, the probability of damage to the plaintiffs' goodwill/business were convincing (see para 115).

(7) The letters clearly showed that the first plaintiff was merely enquiring from the authorities whether the first defendant had obtained the necessary approval for their advertisement. JPN had replied confirming that the first defendant had not received the necessary approval. Hence, there was no merit in the defendants' claim for defamation. There was no

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defamatory statement in any of those letters from the plaintiff. The first defendant failed to prove that there was any malice on the part of the first plaintiff (see paras 124 & 127).

(8) The tort of unlawful interference arises when one person using unlawful means with an object of causing damage to another. There was no unlawful interference as the first plaintiff did not use any unlawful means against the first defendant. The first plaintiff was merely writing letters of enquiries to the authorities and had no intention to cause any damage to the first defendant. Any action taken by JPN was on their own accord and was not caused by the first plaintiff (see paras 135–136).

[Bahasa Malaysia summary

Plaintif adalah syarikat pegangan kepada sekumpulan anak syarikat termasuk plaintif-plaintif kedua hingga kelapan dalam perniagaan pembinaan dan kejuruteraan. Plaintif-plaintif dikenali sebagai Ken Group Of Companies. Syarikat-syarikat defendan juga terlibat dalam pembangunan hartanah. Sekitar Jun 2011, defendan-defendan telah melancarkan salah satu daripada projek pembangunannya dikenali sebagai Projek D'Pines@Ampang. Tanda 'Ken City + Device (Corporate Logo)' telah digunakan dalam bahan promosi Projek D'Pines@Ampang termasuklah iklan dalam beberapa akhbar. Defendan pertama tidak memperolehi kelulusan yang diperlukan untuk iklan itu diiklankan dalan akhbar dan juga untuk sepanduk dan banting mereka. Plaintif-plaintif dengan itu memfailkan guaman ini pada 5 Oktober 2011 terhadap defendan pertama kerana kelirupaan. Sekitar November 2011, defendan telah memulakan satu lagi projek dikenali sebagai Projek Ken City Square@Ampang dan menggunakan tanda 'Ken City' dan satu lagi peranti dalam iklan-iklannya dalam bentuk sepanduk, bunting, poster dan papan iklan. Defendan pertama menyangkal tuntutan plaintif-plaintif dan menuntut balas untuk fitnah dan campur tangan tidak sah. Plaintif-plaintif menegaskan bahawa nama baik dan reputasinya berkenaan tanda dalam pembangunan hartanah dan sektor pembinaan berdasarkan penggunaan tanda tersebut yang berterusan dan lama oleh mereka. Walau bagaimanapun defendan-defendan berhujah bahawa tanda 'Ken' adalah perkataan biasa dalam bahasa Inggeris dan justeru tidak timbul nama baik daripadanya. Tuntutan-tuntutan balas defendan-defendan untuk fitnah dan campur tangan tidak sah adalah berkaitan surat-surat yang ditulis oleh plaintif pertama kepada pihak berkuasa terutamanya, Jabatan Perumahan Negara ('JPN') dan Majlis Perbandaran Ampang Jaya ('MPAJ'). Plaintif-plaintif menegaskan bahawa surat-surat tersebut hanya surat-surat pertanyaan dan ia telah ditulis dengan syarat perlindungan dan kenyataan-kenyataan dalam surat-surat tersebut adalah benar. Isu-isu tersebut dibangkitkan untuk dibicarakan: (i) sama ada defendan pertama telah memperolehi kelulusan pihak berkuasa yang diperlukan sebelum mengiklankan tanda 'KEN CITY' itu; (ii) sama ada defendan pertama telah melakukan kelirupaan; dan (iii) sama ada plaintif-plaintif

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bertanggungjawab di bawah fitnah dan campur tangan tidak sah kerana menulis kepada pihak berkuasa.

Diputuskan, membenarkan tuntutan plaintif-plaintif dan menolak tuntutan balas defendan-defendan dengan kos:

(1) Sebelum pemaju boleh mengiklankan projek pembangunan perumahannya atau menjual unit-unitnya, ia perlu memperolehi Permit Pengiklanan dan Jualan ('PPJ'). Peraturan-Peraturan Pembangunan Perumahan (Kawalan dan Pelesenan) 1989 juga menghendaki pemaju-pemaju untuk mengemukakan bahan-bahan cadangan pengiklanan mereka kepada Kementerian untuk kelulusan sebelum ia boleh diterbitkan atau dipamerkan. Defendan pertama tidak memperolehi kelulusan untuk iklan-iklan yang mengandungi perkataan-perkataan 'Ken City' (lihat perenggan 22–23 & 36).

(2) Bentuk klasik salah tanggap yang mewujudkan tindakan kelirupaan adalah salah tanggap oleh defendan bahawa barangannya adalah barangan plaitnif-plaintif. Namun ini bukan sahaja bentuk kelirupaan. Ia adalah kelirupaan untuk salah tanggap bahawa perniagaan seseorang itu adalah perniagaan plaintif-plaintif atau berkaitan dengan perniagaan plaintif-plaintif, dalam apa cara yang mungkin menyebabkan kerugian. Jika nama dagangan mencadangkan bahawa perniagaan defendan adalah tambahan, cawangan atau sebaliknya berkaitan dengan perniagaan plaintif-plaintif, maka plaintif-plaintif mungkin boleh mendapat remedi kelirupaan (lihat perenggan 66–67).

(3) Ia adalah mungkin untuk nama biasa mempunyai maksud kedua dan berbeza daripada plaintif walaupun ia adalah nama orang. Ia adalah mungkin untuk nama deskriptif mempunyai maksud kedua jika keterangan nama baik boleh ditunjukkan. Keterangan menunjukkan bahawa plaintif-plaintif telah mula menggunakan perkataan 'Ken' sebagai nama projek-projeknya untuk pembangunan hartanah seawal 2000, yang jelas mendahului apa-apa penggunaan defendan-defendan dalam tanda 'Ken' oleh plaintif-plaintif, pihak awam telah mengaitkan tanda 'KEN' dengan plaintif-plaintif dalam pembangunan hartanah dan sektor pembinaan dan 'Ken' mempunyai maksud kedua yang membezakannya dengan plaintif-plaintif (lihat perenggan 76, 82 & 89).

(4) Dalam membuktikan bahawa terdapat salah tanggap yang timbul daripada pengaitan yang salah, plaintif-plaintif tidak perlu membuktikan kekeliruan sebenar. Bukti semata-mata kemungkinan kekeliruan adalah memadai dalam tindakan kelirupaan. Plaintif-plaintif telah mengemukakan keterangan secukupnya bahawa orang awam mengaitkan plaintif-plaintif dengan defendan-defendan. Plaintif-plaintif dan defendan-defendan sedang bersaing dalam industri yang sama, terutamanya pembangunan hartanah dan sektor pembinaan.

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Plaintif-plaintif telah membuktikan keterangan kekeliruan yang timbul daripada defendan-defendan menggunakan tanda 'Ken' (lihat perenggan 97 & 103).

(5) Jika barangan atau khidmat oleh kedua-dua pihak dalam tindakan kelirupaan adalah suatu persaingan langsung antara satu sama lain, mahkamah sedia membuat inferens kemungkinan nama baik penuntut akan terjejas. Tiada keperluan untuk membuktikan kerugian sebenar. Kedua-dua plaintif-plaintif dan defendan pertama terlibat dalam bidang aktiviti sama iaitu pembangunan hartanah dan pembinaan. Oleh itu, kemungkinan terdapat kerugian kepada plaintif boleh disimpulkan (lihat perenggan 110 & 112).

(6) Berdasarkan keterangan bahawa pasaran hartanah adalah pasaran khusus di mana reputasi pemaju adalah penting dan diperkukuhkan dengan fakta bahawa defendan pertama mempunyai rekod buruk sebagai pemaju hartanah di Malaysia, kebarangkalian terdapat kerugian terhadap nama baik/perniagaan plaintif-plaintif adalah meyakinkan (lihat perenggan 115).

(7) Surat-surat tersebut jelas menunjukkan bahawa plaintif pertama sekadar bertanyakan daripada pihak berkuasa sama ada defendan pertama telah memperolehi kelulusan yang diperlukan untuk pengiklanan mereka. JPN telah menjawab dengan mengesahkan bahawa defendan pertama tidak menerima kelulusan yang diperlukan itu. Justeru, tiada merit dalam tuntutan defendan-defendan untuk fitnah. Tiada kenyataan fitnah dalam mana-mana surat tersebut daripada plaintif. Defendan pertama telah gagal membuktikan bahawa terdapat apa-apa niat jahat di pihak plaintif pertama (lihat perenggan 124 & 127).

(8) Tort berhubung campur tangan tidak sah adalah berbangkit apabila seseorang itu menggunakan cara yang menyalahi undang-undang terhadap objek sehingga menyebabkan kerugian kepada seorang lain. Tiada campur tangan yang tidak sah kerana plaintif pertama tidak menggunakan apa-apa cara yang menyalahi undang-undang terhadap defendan pertama. Plaintif pertama telah hanya menulis surat-surat pertanyaan kepada pihak berkuasa dan tidak mempunyai niat untuk menyebabkan apa-apa kerugian kepada defendan pertama. Apa-apa tindakan yang diambil oleh JPN adalah atas kemahuan mereka sendiri dan tidak disebabkan oleh plaintif pertama (lihat perenggan 135–136).]

Notes

For a case on unlawful interference with trade, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2010.

For cases on damage, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2484–2485.

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For cases on elements of passing off, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2054–2064.

For cases on goodwill, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2511–2517.

For cases on libel, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

Cases referred to

Amanresorts Ltd and Another v Novelty Pte Ltd [2008] 2 SLR 32, HC (refd)

Annabel's (Berkeley Square) Ltd v G Schock (t/a Annabel's Escort Agency) [1972] RPC 838 (refd)

Cellular Clothing Co v Maxton and Murray [1899] AC 326, HL (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Clock Ltd v Clock House Hotel Ltd (1936) 53 RPC 269, CA (refd)

De Cordova v Vick Chemical Coy (1951) 68 RPC 103 (refd)

Ewing v Buttercup Margarine Co Ltd 1917 2 Ch 1, CA (refd)

IRC v Muller & Co's Margarine Ltd [1901] AC 217 (refd)

Intel Corp v Intelcard Systems Sdn Bhd & Ors [2004] 1 MLJ 595, HC (refd)

Merkur Island Shipping Corpn v Laughton [1983] 2 AC 570, HL (refd)

Reckitt & Colman Products Ltd v Borden Inc [1990] 1 All ER 873, HL (refd)

Seet Chuan Seng v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, SC (refd)

Sinma Medical Products (M) Sdn Bhd v Yomeishu Seizo Co Ltd & Ors [2004] 4 MLJ 358, CA (refd)

Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor [2006] 5 MLJ 262, HC (refd)

Warnink (Erven) v BV Townend & Sons J (Hull) Ltd [1979] AC 731, HL (refd)

Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (refd)

Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd [1996] 2 MLJ 334, HC (refd)

Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor [2012] 1 MLJ 585, CA (refd)

Legislation referred to

Companies Act 1965

Evidence Act 1950 s 114(g)

Federal Capital Act 1960 s 4

Housing Development (Control and Licensing) Regulations 1989 regs 2, 3, 5, 5(1), 6

Housing Development (Control and Licensing) Act 1966 ss 2, 3A, 5(1)

Local Government Act 1976 s 68

Street, Drainage and Building Act 1974 s 29(1)

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Cindy Goh (Eolanda Yeo with her) (Cheang & Ariff) for the plaintiffs.
Kenneth ST James (Maggie Khon with him) (Michael Chai & Co) for the defendants.

Hanipah Farikullah J:

[1] This suit arises out of a dispute about the usage of the mark 'KEN' or 'KEN CITY' in respect of the property development and/or construction industry.

[2] The plaintiffs filed an action against the defendants for passing off on the ground that the defendants, passed-off the plaintiffs' mark 'KEN' ('the plaintiffs' mark') when the defendants used the trademark, 'KEN CITY + DEVICE (Corporate Logo)' ('the defendants' mark') in promotional materials to promote their development projects called D'Pines @ Ampang ('D'Pines @ Ampang Project') and Ken City Square @ Ampang ('Ken City Square @ Ampang Project') development projects that were started in 2011.

[3] The representations of the plaintiffs' mark and the defendants' mark are as follows:

The Plaintiffs' Mark	The Defendants' Mark
KEN	KEN CITY

[4] The reliefs sought by the plaintiffs are as follows:

(a) a declaration that the plaintiffs have established goodwill in relation to the mark 'KEN' in the property development and construction sector or industry and is therefore the common law proprietor of the same in the aforesaid industry;

(b) that the defendants whether acting by itself, its directors, officers, employees, servant or agents or any of them howsoever be restrained forthwith by injunction from passing off or attempting to pass off or causing, enabling or assisting others to pass off themselves as associated and/or connected to the plaintiffs by using the trademark KEN or KEN CITY or any other name or mark confusingly or deceptively similar to the trademark KEN in the property development and construction industry;

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(c) that the first defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them do forthwith deliver up and surrender to the plaintiffs solicitors, their servants or agents any promotional materials or other documents containing the trademark 'KEN' which are in the possession, custody or control of the first defendants, its directors, officers, employees, servants or agents or any of them or otherwise;

(d) an order against the first defendant that the first defendant or its solicitors do file or caused to be filed with this court and do serve or caused to be served on the plaintiffs solicitors within seven days from the date of service of this order, a duly signed and affirmed statutory declaration or affidavit by the first defendant confirming that there is no longer any promotional materials or other documents containing the trademark KEN or KEN CITY which are in the possession, custody or control of the first defendant, its directors, officers, employees, servants or agents or any of them or otherwise;

(e) an inquiry as to damages or damages to be assessed for passing off or at the plaintiffs' option an account of profits and payment of all sums found due from the first defendant to the plaintiffs upon taking such inquiry or account;

(f) additional and/or exemplary damages to be paid by the first defendant;

(g) interest on all sums found to be due to the plaintiffs by the first defendant at such rate and for such periods as this honourable court deems fit;

(h) costs to be paid by all defendants to the plaintiffs; and

(i) such further or other relief or direction as this honourable court may deems fit as against all the defendants.

[5] The first defendant refuted the plaintiffs' claim and counterclaimed for defamation and unlawful interference and the second to the 11th defendants counterclaimed for a declaration that the plaintiffs have no right, sole or exclusive or otherwise, to the name 'KEN'.

[6] The reliefs sought by the defendants are as follows:

(a) general damages of RM30m or such sums as this court thinks fit;

(b) aggravated damages;

(c) injunction from further publication;

(d) a declaration that that the plaintiffs have no right, sole or exclusive or otherwise, to the name KEN; and

(e) cost.

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THE PARTIES

[7] The first plaintiff is a public listed company on the Main Board of Bursa Malaysia Securities Bhd and is the holding company to a group of subsidiary companies including the second to the eighth plaintiffs in the construction, engineering, specialists engineering services, consultancy and property development industry, provision of geotechnical services, building works, turnkey contracts, land reclamation, dredging, soil improvement and property investment. The plaintiffs are known as the KEN GROUP OF COMPANIES.

[8] The first defendant is a property development company. The second, the third and the tenth defendants are companies in the businesses of retailing and dealing of motor vehicles. The tenth defendant is also a dealer of heavy machinery, involves in the businesses of provision of management administrative and business consultancy services. The fifth and the seventh defendants are involved in contractual works on property development. The fourth, the nineth, the tenth and the 11th defendants are also in the business of property development. The sixth defendant is a property holding company. The eighth and the 11th defendant are investment holding companies.

THE AGREED FACTS

[9] It is undisputed between the parties that around June 2011, the defendants launched one of its development project in Taman Nirwana called *D'Pines @ Ampang Project.*

[10] It is also undisputed between parties that the mark KEN CITY + DEVICE (Corporate Logo) was used in the promotional materials of D'Pines @ Ampang Projects including the advertisement in the Star Metro dated 17 June 2011, *Starbiz* dated 11 November 2011, *The Star* dated 18 November 2011, *Berita Harian* dated 17 June 2011 and 11 November 2011, *New Straits Times* dated 17 June 2011 and *Sin Chew Daily* dated 11 November 2011.

[11] The first plaintiff then made enquiries with the relevant authorities and Jabatan Perumahan Negara ('JPN') has confirmed in writing to the first plaintiff that the first defendant had not obtained the necessary approval for the advertisement that was advertised in *The Star*, *Berita Harian* and *Sin Chew Jit Poh* newspapers and also for their banners and buntings. JPN confirmed that the approved advertisement does not contain the mark 'KEN CITY' and the matter will be investigated pursuant to reg 5(1) of the Housing Development (Control and Licensing) Regulations 1989.

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[12] The plaintiffs then filed the present suit on 5 October 2011 against the first defendant for passing off.

[13] Sometime in November 2011, the defendant also started another project called Ken City Square @ Ampang Project and had used the mark KEN CITY and another device in its advertisements in the form of banners and buntings and posters and billboard.

[14] On 4 January 2012, the plaintiffs obtained an interlocutory injunction to restrain the first defendant from continuing using the mark, KEN CITY in respect of property development business on 4 January 2012.

BACKGROUND FACTS

[15] I will now turn to the background facts. The background fact of this case is important in the context of the issues to be determined by this court.

[16] The chronology of material events as summarised by learned counsel for the plaintiffs are as follows:

No.	Date	Description
1.	September 1980	Formation of Ken's predecessor, Ken Grouting System Specialists (sole proprietor) (KGSS)
2.	8 September 1982	KGSS converted to private limited company, Ken Grouting System Specialist Sdn Bhd (Later change name to Ken Grouting Sdn Bhd or the second plaintiff)
3.	3 September 1983	Incorporation of Ken Holdings Sdn Bhd (the first plaintiff)
4.	11 April 1984	Incorporation of Ken Property Sdn Bhd (the third plaintiff)
5.	19 June 1995	Incorporation of Ken-Chec Sdn Bhd (the seventh plaintiff)
6.	2000	Launch of the plaintiffs' first property development project — KEN Damansara
7.	2000	Launch of the plaintiffs' KEN AMAN — Pangsapuri Aman 1
8.	2002	Launch of the plaintiffs' KEN AMAN — Kantan Court Launch of the plaintiffs' KEN AMAN — three storey shop house
9.	2003	Launch of the plaintiffs' KEN AMAN — Pangsapuri Seri Pagi
10.	10 June 2003	Neighbourhood Land Sdn Bhd changed to Ken City Development Sdn Bhd (the eighth defendant)
11.	15 December 2003	Tufflink Sdn Bhd changed to Ken Link Sdn Bhd (the sixth plaintiff)

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12.	27 December 2003	Kintakar Sdn Bhd changed to Ken City Ipoh Sdn Bhd (the tenth defendant)
13.	27 December 2003	Kenco Engineering Sdn Bhd changed to Ken City Bidor Sdn Bhd (the nineth defendant)
14.	2004	Launch of the plaintiffs' KEN Damansara II Project
15.	2005	Launch of the plaintiffs' KEN Damansara III Project
16.	2006	Launch of the plaintiffs' Pangsapuri KEN RIMBA I
17.	2007	Launch of the plaintiffs' KEN Bangsar Project
18.	2008	Launch of the plaintiffs' KEN AMAN project Launch of plaintiffs' Pangsapuri KEN RIMBA II
19.	12 August 2009	Ken Rimba Jaya Sdn Bhd changed to Ken Rimba Sdn Bhd (the fifth plaintiff)
20.	10 September 2009	Aunyang Holdings Sdn Bhd changed to Ken TTDI Sdn Bhd (the eighth plaintiff)
21.	2010	Launch of plaintiffs' KEN RIMBA Legian Launch of plaintiffs' KEN RIMBA Commercial Centre
22.	17 June 2011	D1 places first advertisement using KEN CITY in The Star Metro, Berita Harian NST & Sin Chew for D'Pines @ Ampang project (pp 896, 907, 947 IDB B4)
23.	17 June 2011 to 18 June 2011	The plaintiffs' purchasers called up the plaintiffs' representative inquiring about the D'Pines @ KEN CITY project.
24.	6 July 2011	The plaintiffs' solicitors issued letter of cease and desist to D1.
25.	7 July 2011	The first plaintiff files in TM application in Class 37 (different image from the first application)
26.	19 July 2011	D1's solicitors replied to the plaintiffs' letter of cease and desist dated 6 July 2011.
27.	29 July 2011	Reply from the plaintiffs' solicitors to the defendant's solicitors
28.	5 August 2011	The second defendant files in TM application in Class 37.
29.	12 August 2011	Major Returns Sdn Bhd changed to Ken City Penang Sdn Bhd (the 11th defendant)
30.	11 November 2011	D1 advertised in Star, Berita Harian and Sin Chew with KEN CITY mark (pp 945, 946, 947 IDB B4)
31.	18 November 2011	Another advertisement in Star by D1 on KEN CITY mark for D'Pines (p 948 IDB B4)
32.	Between Nov to Dec 2011	The plaintiffs found out about D1's second project called KEN CITY Square which was formerly known as City Garden Commercial Square
33.	4 January 2012	Interlocutory Injunction Against D1 was obtained
34.	30 January 2012	The plaintiffs took photos to show that D1 is still using the mark 'KEN CITY' in their banners and buntings.

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35.	1 March 2012 6 March 2012	D1 files in affidavits to show it complies with the interlocutory injunction order.
36	10 March 2012	The plaintiffs took photos at buntings and D1's sales office to show that they are still using the mark KEN CITY.

ISSUES TO BE TRIED

[17] The issues to be tried are as follows:

(a) whether the first defendant had obtained the necessary authorities' approval before advertising the mark KEN CITY;

(b) whether the first defendant had committed passing off as claimed by the plaintiffs; and

(c) whether the plaintiffs are liable under defamation and unlawful interference for writing to the authorities.

THE STATUTORY PROVISIONS

[18] Before I consider the various issues raised by the parties, it is important to highlight the relevant statutory provisions that regulate advertisement approvals in relation to a development to be applied to the facts of this present case. In this connection, learned counsel for the plaintiffs submitted as follows.

[19] Advertisement and sale permit ('AP') and developer's license ('DL'), which are collectively known as ('APDL') are the two essential items for a housing developer ('developer') to begin developing a housing development project ('project').

[20] A developer is required to obtain a DL before it can commence with property development project that falls under the definition of a 'housing development' in the Housing Development (Control and Licensing) Act 1966 ('HDA').

[21] Section 5(1) of the HDA provides that:

> No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

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[22] Before a developer can proceed to advertise its housing development project or sell the units, it is required to obtain an AP.

[23] Regulation 5(1) of the Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989') states:

> No advertisement or sale shall be made by any licensed housing developer without an advertisement and sale permit having first been obtained from the Controller.

[24] The APDL are both issued by the Ministry of Housing ('the ministry') by the application of the respective housing developers.

[25] The regulation for the application of a DL can be found at regs 3 and 5 of the HDR 1989 regulates the issuance of the AP.

[26] The HDR 1989 also regulates the advertisements released by developers for their respective housing developments. The definition of 'advertisement' according to reg 2 of the HDR 1989 is as follows:

> any notification or intimation of housing development:
>
> (a) published in any newspaper, journal or magazine, or in the form of a brochure or in any other form; or
>
> (b) displayed on any hoarding, boarding, roof, wall, piling, fence, frame, signboard, plate, cloth, bar, pillar, post, wire-casting or other erection, structure or contrivance; or
>
> (c) conveyed by means of films or communications; or
>
> (d) conveyed by other means oral or written and whether of the same kind or not as set out in paragraphs (a) to (c).

[27] In addition to obtaining AP's before advertising their projects, the HDR 1989 requires developers to submit their proposed advertising materials to the ministry for approval before it can be published or displayed.

[28] Pursuant to reg 5 of the HDR 1989, it is a legislative requirement for a developer to get an approval for each and every one of their advertisements, each banner, bunting, newspaper advertisement, television advertisement, will need a separate approval. Further, even though a developer had initially obtained an approval for its brochure when applying for an AP, should there be any further additions, or any changes to the advertisements, the developer will be required to apply for approval for those relevant changes.

[29] Pursuant to s 68 of the Local Government Act 1976, a local council

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such as Majlis Perbandaran Ampang Jaya ('MPAJ') or Majlis Daerah Tapah is the proper authority to approve the name of any housing project or housing estate.

[30] Section 68 of the Local Government Act 1976:

> 68 A local authority may, with the approval of the State Authority, *determine the name by which any public place or housing estate or housing scheme shall be known* and may from time to time alter the name of any public place or housing estate or housing scheme or of any part thereof whether or not such name was applied to such place, estate or scheme before the commencement of this Act.
>
> Interpretation
>
> 2 In this Act, unless the context otherwise requires — 'local authority' means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under s 4 of the Federal Capital Act 1960 [Act 190].(Emphasis Added.)

[31] Similarly, the local council is also the proper authority to approve the address or the street name of any housing project or housing estate.

[32] Section 29(1) of the Street, Drainage and Building Act 1974 states:

> 29(1) The local authority may, subject to the approval of the State Authority, *determine the name by which any street shall be known and may alter the name of any street or part of a street.*(Emphasis Added.)

[33] In my view, the above submissions is an accurate statement of the law.

WHETHER THE FIRST DEFENDANT HAD OBTAINED APPROVAL FOR ITS PROMOTIONAL MATERIALS FOR BOTH THE D'PINES @ AMPANG AND THE KEN CITY SQUARE PROJECTS

[34] Before applying the law, it is necessary to consider the evidence adduced by the parties. The chronology of events for the newspapers advertisement approvals in relation to the D'Pines @ Ampang Project and Ken City Square @ Ampang project developments as adduced by the witnesses may be summarised as follows:

No	Date	Exhibit/Page	Event/Description

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1.	17 June 2011	pp 896, 907, 947 B4	*June Newspaper advertisement* The first defendant (D1) places first advertisement for KEN CITY in the Star Metro, NST, Berita Harian & Sin Chew Daily PW2 on behalf of the first plaintiff (P1) makes a call to PW1 to inquire whether D1 has approval to use the name 'KEN CITY'.
2.	Between 20 June 2011 to 21 June 2011	Answer to Q10 P1	PW1 contacted the first defendant and asked them to put in application for approval for addition/amended advertisement.
3.	22 June 2011	p 1463 B6	*Pindaan/Tambahan* application D1 applies to the ministry for the addition/amended advertisement.
4.	24 June 2011	p 6-10B6/ exh D (A- E); and exh P3 (A-G)	*Pindaan/Tambahan Approval* Letter from the ministry to D1. The word 'KEN CITY' is cancelled in the approved draft advertisement returned by the Ministrt to D1.
5.	5 July 2011	p 907A–907B B4	*June Newspaper advertisement* Letter from P1 to the Ministry P1 attaches the 17 June 2011 Star advertisement published by D1 and inquires if the necessary approval for advertisement was obtained.
6.	6 July 2011	p 908 B4	*Project Name* Letter from P1 to MPAJ P1 write to inquire whether approval was given to D1 to use the name 'KEN CITY'.
7.	14 July 2011	p 920 B4	*June Newspaper advertisement* Letter from the Ministry to P1 Ministry informs P1 that the advertisement as attached to P1's letter dated 5 July 2011 was not approved and that the matter would be investigated under Reg 5 (1) of the Housing Development (Control and Licensing) Regulations (HDR) 1989
8.	27 July 2011	pp 921–923 B4	*Banners/Buntings* Letter from P1 to the Ministry P1 inquires if D1 had received approval for their bunting and banner advertisements.

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9.	12 September 2011	p 927 B4	*Banners/Buntings* Letter from the Ministry to P1 The Ministry informs P1 that serious attention has been taken toward the complaint and the matter had been referred to the Enforcement Department.
10.	19 September 2011	p 928 B4	*Banners/Buntings* Letter from the Ministry to P1 The Ministry informs P1 that D1 did not receive any approval for the banners and the buntings and that there would be an investigation on the matter.
11.	24 October 2011	exh P9	*Pindaan/Tambahan* application D1 applies to the Ministry for the approval of advertisements to be placed in Star, Berita Harian and Sin Chew Daily on 11 November 2011 and 18 November 2011.
12.	24 October 2011	exh P5	*Pindaan/Tambahan* application D1 applies to the Ministry for approval of their buntings
13.	4 November 2011	exh D7	*Pindaan/Tambahan* application for Banner/Buntinq and Newspaper Advertisement D1 writes in to the Ministry explaining its usage of the 'KEN CITY' logo.
14.	8 November 2011	exh P6 (A-F)	*Banners/Buntings* The Ministry approved the application for D1's banners and buntings subject to deletion or removal of the word KEN CITY, which word was duly cancelled from the draft materials.
15.	10 November 2011	exh P8	Letter from the Ministry to D1 The Ministry refers to its 8 November 2011 letter & informs D1 that the usage of the logo 'KEN CITY' would be disallowed until the ongoing court proceeding was concluded.
16.	11 November 2011	pp 945, 946, 906 B4, exhs P39, P40, P41	November Newspaper advertisements D1 advertised in Star, Berita Harian and Sin Chew with KEN CITY mark

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17.	14 November 2011	pp 1691–1691B B6	November Newspaper advertisement Letter from P1 to the Ministry P1 informs the Ministry that D1 had placed their advertisements in Star-Biz and Berita Harian-Ekonomi on 11 November 2011 (November advertisements). P1 requests for another confirmation of whether D1 had received approval for the advertisement with the mark 'KEN CITY'.
18.	18 November 2011	p 948 B4	November Newspaper advertisement Another advertisement in Star by D1 with KEN CITY logo
19.	25 November 2011	p 1692 B6	November Newspaper advertisement Letter from the Ministry to P1 Reply to P1's inquiry on 14 November 2011 stating that approval to advertise additional advertisements was allowed subject to removal/deletion of 'KEN CITY'. D1 was not allowed to use the logo 'KEN CITY' in those advertisements.
20.	6 December 2011	p 1696 B6	letter from P1 to the ministry P1 requests for reconfirmation whether D1 has obtained approval to use the name 'KEN CITY' and for the Ministry to provide documentation to show that D1 had not obtained approval.
21.	6 December 2011	pp 1693 to 1695 B6	Ken City Square brochure Letter from P1 to the Ministry enclosing Ken City Square brochure Inquiry if D1 had obtained the approval from the Ministry to use 'KEN CITY' for D1's 'Ken City Square' mixed development as indicated by D1.
22.	6 December 2011	p 1697 B6	Letter from P1 to the Ministry P1 inquires from the Ministry if any action has been taken against D1.
23.	6 December 2011	exh P13	Project Name Letter from P1 to MPAJ P1 requests for confirmation if D1 had obtained the approval to change the development Sri Ketapang to D' Pines @ Ampang' for the mixed development.

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24.	9 December 2011	pp 930–934 B4	*Pindaan/Tambahan* application Letter from P1 to Ministry P1 encloses the purported approvals from the Ministry obtained from D1 through the affidavit affirmed by DW1 for the interlocutory injunction. P1 inquires if the Ministry had given approval as per the draft enclosed.
25.	12 December 2011	p 935 B4	*Pindaan/Tambahan* application letter from the ministry to P1 The Ministry states that although both the applications to advertise additional advertisements were approved but with the cancellation of the word 'KEN CITY' on the approved draft advertisements.

WHETHER THE ADVERTISEMENTS IN JUNE 2011 AND NOVEMBER 2011 AND BROCHURES, BANNERS, BUNTINGS FOR THE D' PINES @ AMPANG PROJECT HAVE BEEN APPROVED BY JPN

(i) June advertisement/D' Pine Project

[35] I must first deal with the issue of whether the newspaper advertisements in June 2011 and November 2011 and brochures, banners, buntings for the D'Pines @ Ampang project was approved by JPN. In this regard, I will consider the evidence of the witnesses.

[36] PW1, Mr Suhaimi from JPN had testified that through a letter dated 14 July 2011 (p 920 B4), JPN has confirmed with the first plaintiff that D1 had not obtained approval for the *June 2011 advertisements (pp 896, 907B and 947 B4)*. In the letter, JPN has also informed that the matter will be investigated pursuant to reg 5(1) of the Housing Development (Control and Licensing) Regulations 1989:

> Untuk makluman pihak tuan, Man yang bertarikh 17 Jun 2011 oleh Syarikat Sri Seltra Sdn Bhd untuk pemajuan D'Pines @ Ampang seperti yang dilampirkan oleh pihak tuan tidak pernah mendapat sebarang kelulusan dari pihak kami.

[37] PW1 also testified that through a letter dated 19 September 2011

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(p 928 B4), JPN has confirmed with the first plaintiff that the first defendant had not obtained approval for the *brochures, banners and buntings* that contains KEN CITY.

[38] Further, PW2 testified that through a letter dated 25 November 2011 (p 1692 B6), JPN has confirmed with the first plaintiff that they had cancelled the word KEN CITY from the draft advertisement produced by the first defendant when they granted approval for the *November 2011 advertisements.*

[39] However, the first defendant contended that it had received a letter of approval dated 24 June 2011 from JPN (bundle C, pp 6–10 OR D4 A-E).

[40] It must however be noted that this letter was issued by JPN after the publication of the said advertisements on 17 June 2011. In fact, in cross-examination, DW1 confirmed that when the first defendant advertised the advertisements on 17 June 2011, they did not get the approval of JPN.

[41] The evidence shows that the draft advertisements submitted by the first defendant for approval were different from the earlier advertisements published on 17 June 2011. In relation to this point, I accepted the plaintiffs' contention that even if there was approval by JPN, such approval would not operate to approve the advertisements of 17 June 2011, as drafts of those advertisements were never submitted for approval. This was also admitted by DW2.

[42] It is noted that there are two versions of the approval letter dated 24 June 2011 before this court:

(a) a version produced by the first defendant identified in bundle C, pp 6–10 OR D4A-E, and the copy produced by PW1 (a subpoenaed witness from JPN) where a copy was made from JPN's file (exh P3 A-G). The version produced by the first defendant only contained four draft advertisements; whereas the copy of the same letter produced by PW1 from JPN's file enclosed six draft advertisements. In relation to this, DW2 admitted, during cross examination, that he had submitted all six copies found in JPN's file but gave no explanation why he had only produced four draft copies in court in his witness statement. DW2 also admitted that he did not ask JPN for the two copies which he alleged he did not receive back;

[43] In this regard, the defendants submitted that PW1 is not in the position to testify on behalf of Mohd Zaini who signed P3A and D4A as to whether or not Mohd Zaini overlooked in not cancelling the words 'KEN CITY' in exh D4B. It should be noted that in one of the drafts retained by the defendants

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namely exh D4B, the words Ken City were not deleted by JPN. PW1 had testified that it must have been an oversight by JPN as all the other drafts in the JPN's file records have the said words deleted.

[44] In relation to this point, learned counsel for the plaintiffs submitted and I accept that the burden of proof is on the defendant and not the plaintiff to call Mohd Zaini to testify on the matter since D4A is a document produced by the defendant.

[45] Thus, adverse inference is drawn against the first defendant as they had failed to call Mr Mohd Zaini to testify in court as to whether approval was indeed granted to the first defendant to use KEN CITY (see s 114(g) of the Evidence Act 1950).

[46] In my view on the balance of probabilities the evidence shows that first defendant's June 2011 advertisements did not have proper approval from JPN as admitted by DW2, the first defendant's own witness. The non-approval was also confirmed by PW1 and corroborated by the documents from JPN as stated earlier.

(ii) November advertisement and banners and buntings

[47] In JPN's letter of approval to the first defendant dated 8 November 2011 (P6) it is observed that the words KEN CITY was deleted from the draft brochures, banners and buntings (see PF A–E) and the newspapers advertisement (P6F).

[48] The first defendant claimed the Mr Alaham from JPN has orally informed them that they were allowed to use KEN CITY. However, this is inconsistent with the written evidence found in P6 which was signed by Mr Alaham himself where the word KEN CITY has been cancelled from all the drafts.

[49] In relation to this issue, adverse inference should also be drawn against the first defendant as they had failed to call Mr Alaham to testify in court as to the purported oral approval that was given by Mr Alaham as alleged by the defendants (see s 114(g) of the Evidence Act 1950).

[50] Thus, I find that there is no basis in the defendants' submission that the November 2011 advertisements were approved by JPN and that the first defendant was not aware of the deletion of the words 'Ken City' in JPN's letter

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of approval dated 8 November 2011 (P6) as this contradicts the admissions made by their own witness, DW2, during cross examination. This is what DW2 said:

CKY	So, the confirmation 1 need to seek from you is on fourth of November, you had oral notification from Mr Alaham and Mr Suhaimi that you are not to use the logo of Ken City. Yes, you confirm that?
Michael	Yes
CKY	And on the eighth November, you have received the amendment from the ministry to delete Ken City which you have confirmed. Correct?
Michael	Yes
CKY	Therefore you know that both from the oral and the cancellation, the ministry has not allowed Sri Seltra to use the logo Ken City in the buntings and advertisements. Correct?
Michael	Yes
	…
CKY	So, you also on the tenth of November have written confirmation from the ministry again to say that you are not to use, Ken City has been cancelled, not to be used. Correct? Yes?
Michael	Yes

[51] The documents from JPN to the first defendant (see P6 and P8) show that no approval has been given for the November 2011 advertisements and the buntings/banners. Further, the above evidence shows that DW2 had admitted that the first defendant was aware of the direction from JPN.

KEN CITY BIDOR

[52] Based on the evidence adduced by the parties, it is my finding that 'Ken City Bidor' is not an approved name to be used by the local council in Tapah as required under the law. Thus, all references to the same in any brochure would not assist the defendants as all such usage would be unauthorised.

USE OF KEN CITY AS A PROJECT NAME IN KEN CITY SQUARE @ AMPANG

[53] The defendants also submitted that it had approval to use the name 'Ken City' as a project name in Ken City Square @ Ampang. On this issue, the rightful authority in this present case to approve 'Ken City Square' as a project name would be the local municipal namely Majlis Perbandaran Ampang Jaya (MPAJ).

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[54] Further, the first defendant did not deny that it had received a letter from MPAJ which disapproved the name 'Ken City Square' (see bundle A2, p 381).

[55] Therefore, there is no basis for the defendants to submit that the name 'Ken City Square' had been approved by the local authority and there is also no basis to rely on the name as reflected in the developer's licence as an approved name by the local council. As such, I agree with the plaintiff that the name as reflected in the developer's licence was a name unilaterally inserted by the first defendant and as admitted by DW2, is an unapproved project name.

WHETHER THE FIRST DEFENDANT IS STILL REQUIRED TO OBTAIN THE APPROVAL FOR BROCHURES, BANNERS AND BUNTINGS ALTHOUGH THEY RECEIVED THE AP DATED 10 JANUARY 2011 (P2A)

[56] The first plaintiff contended that the AP dated 10 January 2011 (P2A) was a general approval which allowed the first defendant to advertise its banners and buntings without having to apply to the ministry to approve the banners and buntings.

[57] I am of the view that by virtue of reg 5(6) of the HDR 1989, the first defendant is required to obtain separate approval for all brochures, banners and buntings which falls under the definition of 'advertisement' under reg 2 of the HDR 1989 as explained earlier. This was also confirmed by PW1.

WHETHER THE FIRST DEFENDANT IS REQUIRED TO OBTAIN APPROVAL FOR ADVERTISEMENT OF KEN CITY SQUARE WHICH IS A MIXED DEVELOPMENT

[58] The question that arose for consideration is whether Ken City Square is a commercial development and hence is not required to obtain AP from JPN.

[59] DW2 testified that Ken City Square is a mixed development project comprises of not only commercial lots, but also service apartments within the same development area.

[60] It is also shown in the first defendant's brochure (pp 377–380 of bundle A2) that the Ken City Square project consists of shop lots and service apartments.

[61] Regulation 2 of the HDR 1989 has defined 'Advertisement' to mean notification or intimation of housing development.

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[62] Section 2 of the Housing Development (Control and Licensing) Act (Auth 1 PBOA) defines 'housing development' as follows:

> to develop or construct or cause to be constructed in any manner whatsoever more than four units of *housing accommodation* … (Emphasis Added.)

[63] Section 2 of the Housing Development (Control and Licensing) Act also defines 'housing accommodation' as any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or *partly for human habitation and partly for business premises* and such other type accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to s 3A.

[64] Thus, based on the above statutory provisions, it seems to me that any promotional material for a 'mixed development' will require the AP from JPN.

WHETHER THERE IS PASSING OFF

[65] Before turning to the issue of passing off, it is worth bearing in mind the law of passing off. Many authorities were cited to me on the passing off by both parties. I do not find it necessary to refer to all.

[66] The classic form of misrepresentation giving rise to an action in passing off is a misrepresentation by the defendant that his goods are the goods of the plaintiffs. But that is no longer the only form of passing off. It is passing off to misrepresent that one's business is that of the plaintiffs, or connected with that of the plaintiffs, in any way likely to cause damage. As stated by Romer LJ in *Clock Ltd v Clock House Hotel Ltd* (1936) 53 RPC 269:

> … no man is entitled to carry on his business in such a way or by such a name as to lead to the belief that he is carrying on the business of another man or to lead to the belief that the business which he is carrying on has any connection with the business carried on by another man.

and more recently by Lord Diplock in *Warnink (Erven) v BV Townend & Sons J (Hull) Ltd* [1979] AC 731 at pp 741–742:

> where although the plaintiff and the defendant were not competing traders in the same line of business, a false suggestion by the defendant that their businesses were connected with one another would damage the reputation and thus the goodwill of the plaintiff's business.

[67] If a trade name suggests that the defendant's business is an extension,

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branch or otherwise connected with the plaintiffs' business, the plaintiffs could have a remedy in passing off (see *Ewing v Buttercup Margarine Co Ltd* [1917] 2 Ch 1).

[68] It is settled law that in any passing off action a plaintiffs must establish (i) goodwill; (ii) misrepresentation; and (iii) actual or potential damage (see *Seet Chuan Seng v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770 at 782).

[69] In the present matter, the plaintiffs contended that they have goodwill and reputation in the plaintiffs' mark in the property development and construction sector due to their long continuous usage of the mark.

[70] With regards to goodwill, Lord Lindley in the case of *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 at p 235 said as follows:

> Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection, I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and in my opinion, exist where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.

[71] Before I deal with the issue of whether the plaintiffs own goodwill over the mark KEN, I will have to deal with the defendants argument that the mark 'KEN' is a common word in the English language and hence no goodwill can arise out of it. In support of its contention, learned counsel for the defendants had adduced evidence during trial that there is a list of companies in Malaysia which use KEN as part of their business company's names (see pp 1074–1177 of bundle B4).

[72] Hence, learned counsel for the defendant argued that the name 'KEN' is common in the field of property development and construction and therefore it cannot be exclusive or distinctive of the plaintiffs useless the plaintiffs are able to prove that the mark 'KEN' standing alone has acquired secondly hearing.

[73] Referring to the House of Lords decision in the case of *Cellular Clothing Co v Maxton and Murray* [1899] AC 326, the defendants contended that it is almost impossible for a common word or a common name such as 'KEN' to be monopolised by the plaintiffs unless it has acquired secondary meaning. In

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order to qualify under the definition of secondary meaning, the plaintiffs must prove that the 'KEN' is more than a common name and the plaintiffs have failed to prove this.

[74] Learned counsel for the plaintiffs attacked the defendants argument on the following grounds:

(a) the defendants failed to show any evidence on what are the activities of those companies;

(b) the defendants failed to show any evidence that those companies use 'KEN' as a mark to promote their business. Having a company name alone does not necessarily mean that the company is using 'KEN' as a mark;

(c) the defendants failed to show how these companies brand themselves and whether the branding is similar to the plaintiffs;

(d) the defendants failed to show that those companies are still a going concern. In fact, the company search of Ken Foong (M) Sdn Bhd and Ken Hu Construction Sdn Bhd (pp 347–352 and 353–358 A2) shows that they have been wound up; and

(e) The defendants failed to provide any evidence to show that the public associate the mark 'KEN' with these other companies instead of the plaintiffs in the property development and construction sector.

[75] I pondered long and hard about this point. However, with respect I do not agree with the defendants' arguments. On the other hand, I found the plaintiffs' submission extremely persuasive. My reasons follow.

[76] Cases have shown that it is possible for a common name to acquire a secondly meaning and is distinctive of the plaintiffs eventhough it is the name of a person.

[77] In the Singapore case of *Amanresorts Ltd and Another v Novelty Pte Ltd* [2008] 2 SLR 32 at p 49, the court held that:

> … the brand name 'Aman', although a descriptive word (meaning 'peace' or 'peaceful') standing by itself, is also a fancy mark when used in relation to hotels and resorts as it is not merely describing the plaintiffs' goods and services. Aman hotel and Aman resort can be and are distinctive as the Hotel de la Paix ('paix' being the French word 'peace') and the Peach Hotel in Shanghai, China.

[78] In *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 All ER 873 at p 885, the court held that:

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> Every case depends upon its own peculiar facts. For instance, even a purely descriptive term consisting of perfectly ordinary English words may, by a course of dealing over many years, become so associated with a particular trader that it acquires a secondary meaning such that it may properly be said to be descriptive of that trader's goods and of his goods alone, as in *Reddaway v Benham* [1896] AC 199.

[79] With regards to the defendants' contention that there are many other companies in Malaysia using 'KEN' as part of their company name (see pp 1074–1177 of B4). I accept the plaintiffs' submission that the list would show that those companies names are not similar to the trade name KEN used by the plaintiffs. The names listed are names such as Kendalian Bina Sdn Bhd, Keng Hooi Construction, Kensington Development Sdn Bhd, Kenwingston Development Sdn Bhd, Kenko Construction, Kenflex Constructions Enterprise, Kenhuat Engineering Sdn Bhd, Kenta Constructions, etc.

[80] The defendants have also failed to provide any evidence to show what are the activities of the company or evidence that these companies are still actively trading or that they have been using 'KEN' as a mark in the property development and construction sector or how these companies brand themselves.

[81] In *Intel Corp v Intelcard Systems Sdn Bhd & Ors* [2004] 1 MLJ 595 at p 606, the court held that:

> From the first defendant's submission, it can only be derived that it is based on a simplistic view that there are hundreds of other companies using the 'Intel' name without permission: why pick on the first defendant? I cannot help but disagree with such a suggestion. Just as absurd is the first defendant's suggestion that the plaintiff's action against the first defendant is untenable because it has not succeeded in taking action against hundreds of companies with the 'Intel' prefix as mentioned by the first defendant.

[82] It is settled law that it is possible for a descriptive name to acquire a secondary meaning if evidence of goodwill can be shown. Hence, in order to determine whether the plaintiffs have established goodwill, the history of the development of the 'KEN' mark need to be examined.

[83] During the trial, PW2 had testified on the background and business activities of the plaintiffs and provided documentary evidence in support to show the long and extensive usage of the mark by the plaintiffs.

[84] The plaintiffs started from the formation of a sole-proprietorship, Ken Grouting System Specialist ('Ken Grouting') in *September 1980*. Ken Grouting was named after its founder, Mr. Kenny Tan Boon Kang. Ken Grouting was

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then converted into a private limited company under the Companies Act 1965 on 8 September 1982 with the name Ken Grouting System Specialist Sdn Bhd finally changed its name to Ken Grouting Sdn Bhd on 23 November 1999 (pp 9–14 A1).

[85] As stated earlier, the first plaintiff namely Ken Holdings Bhd is a public listed company on the Main Board of Bursa Malaysia Securities Bhd (pp 1–8 A1).

[86] The first plaintiff was incorporated on 3 September 1983 and was listed on the Second Board of Kuala Lumpur Stock Exchange on 22 May 1996 before it was elevated to the Main Board on 21 January 2003. To date, the first plaintiff has mainly seven major subsidiary companies, namely the second plaintiff ie Ken Grouting Sdn Bhd incorporated on 8 September 1982, the third plaintiff ie Ken Property Sdn Bhd incorporated on 11 April 1984, the fourth plaintiff ie Khidmat Tulin Sdn Bhd incorporated on 20 November 1995 and the fifth plaintiff ie Ken Rimba Sdn Bhd incorporated on 20 July 1974 and the sixth plaintiff ie Ken Link Sdn Bhd incorporated on 9 June 2000 and the seventh plaintiff ie Ken-Chec Sdn Bhd incorporated on 19 June 1995 and the eighth plaintiff ie Ken TTDI Sdn Bhd incorporated on 7 November 2002 (Form 9 and 13 at ppp 15 and 16 of B1 and company searches from pp 1–52 of A1).

[87] The evidence shows that the plaintiffs commenced usage of the word 'KEN' as its project names for its property developments as early as 2000, which clearly precedes any use of the defendants in the property development sector. However, the first defendant attempted to market its property developments using the 'KEN' name such as 'Ken City' only from June 2011.

[88] To show that they have been using 'KEN in promoting their projects through booklets, brochures, buntings, posters, newspaper advertisements, advertisement in magazines, newsletters, appearances on radio commercials, television commercials, and also during property exhibitions, PW2 has produced voluminous promotional materials during the trial to support the use of the mark by plaintiffs.

[89] Through the extensive use of the mark 'KEN' by the plaintiffs, I am of the view that the public has associated the mark 'KEN' with the plaintiffs in the property development and construction sector and 'KEN' has acquired a secondary meaning which is distinctive of the plaintiffs (see *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334 at p 359; *De Cordova v Vick Chemical Coy* (1951) 68 RPC 103 at pp 104 and 106).

[90] The defendants has also claimed that they have been using 'Kenco' as a

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company name since 1979. In my view, the use of 'Kenco' as a company name is different from the use of 'KEN' as a company name as both names are not similar. The use of the name 'Kenco' does not give rise to a claim as first user of the name 'KEN' which is a different word.

[91] As for the seventh defendant, Ken Concrete Sdn Bhd, it was only incorporated in 1997 and its usage of 'KEN' in the construction industry is after the plaintiffs' usage of 'KEN'. In fact, DW1 has confirmed that the seventh defendant is not a subsidiary of the City Motors Group (p 19 NOP dated 10 August 2012).

CKY	Thank you. Now Dato' Foo, you said in response to Question 2 that you are a director of all the defendants except the seventh defendant. The seventh defendant being Ken Concrete which you have just confirmed that it is not a subsidiary of City Motors Sdn Bhd.
FOO	Yes.

[92] The next element to establish in a passing off action is the element of misrepresentation.

[93] In the case of *Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor* [2006] 5 MLJ 262 at p 296 Ramly Ali J (now JCA) held:

> Misrepresentation in the passing off sense is a false representation on the part of the defendant which causes damage to the goodwill and reputation of the plaintiff through an *unlawful association* created between the defendant and the plaintiff. As set out by Lord Parker in *Spalding v Gamage* at p 450:
>
> The basis of a passing off action being a false representation by the defendant, it must be proven in each case as a fact that the false representation has been made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. *The more common case is where the representation is implied in the use or imitation of a trademark, trade name or get-up with which the goods of another are associated in the minds of the public.* (Emphasis added.)

[94] Learned counsel for the plaintiffs pointed out, to which I agree that the present action is not premised on a classical passing off action but an extended form of passing off action which is well recognised through case law. In a classical passing off action, the defendant's product is usually mistaken for the plaintiff's product. In the extended form of passing off, the misrepresentation is typically a false association with the plaintiffs' business arising from the use by the defendant of a name, trade indicia or mark which is closely associated with the plaintiffs.

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[95] It is the plaintiffs' case that in the present action, the word or mark which is closely associated with the plaintiffs is the mark 'KEN'. In relation to this, learned counsel for the plaintiffs contended that the plaintiffs use the name 'KEN' for, inter alia, as the prefix of its property development projects such as:

KEN DAMANSARA KONDOMINIUM,

KEN DAMANSARA II CONDOMINIUM,

KEN DAMANSARA III CONDOMINIUM,

KEN AMAN TERRACE, KEN BANGSAR,

KEN RIMBA LEGIAN RESIDENCES,

KEN RIMBA Commercial Centre; and

KEN TTDI Corporate Head Office.

[96] Thus, the plaintiffs argued that the first defendant usage of the name 'Ken City' in the promotion of its D Pines Project therefore causes a wrongful unlawful association of that project with the plaintiffs due to the usage of the name 'KEN'.

[97] It is now settled law that in establishing that there was a misrepresentation arising from the wrongful association, the plaintiffs need not prove actual confusion. Only mere proof of possibility of confusion is sufficient in a passing off action.

[98] Referring to the case of *Annabel's (Berkeley Square) Ltd v G Schock (t/a Annabel's Escort Agency)* [1972] RPC 838, the Court of Appeal in *Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor* [2012] 1 MLJ 585 at p 672 held that:

> In ascertaining whether misrepresentation is present, the court must always be mindful of the requirement that a likelihood of association could arise out of the express or colourable activities of the defendants when compared to that of the plaintiffs. And there is, according to *Annabel's (Berkeley Square) Ltd v G Schock (trading as Annabel's Escort Agency)*, no necessity to prove actual association".

[99] *Annabel*'s case laid down the following principles of law:

(a) a likelihood of confusion as opposed to actual confusion would be sufficient; and

(b) passing off could be sustained if there was a possibility of association giving rise to actual or possibility of confusion and deception.

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[100] The plaintiffs had sufficiently adduced evidence that through PW4 and PW5, that the public associated the plaintiffs with the defendants. It is pertinent to note that PW4 and PW5 are independent witnesses.

[101] The element of confusion is further supported by the evidence of PW3, Ms Angle Ng of Maybank.

[102] The evidence of PW2 shows that fellow member at a REHDA meeting also asked him about the defendants' project with the 'Ken City' name thinking that this was a new project under the KEN GROUP.

[103] In this present case, the plaintiffs and the defendants are competing in the same industry, namely the property development and construction sector.

[104] In fact, DW2 admitted during cross-examination that there is a likelihood of association between the plaintiffs and the defendants. This is what DW2 said:

CKY	So, similarly, if you look at property site which we have gone through just now, if you do see a project which is Sunway something, you would have the impression that more likely than not, must be a Sunway project, agree?
MICHAEL	Yes.

CKY	Yes, okay. So, now. That form of perception that you have which you have confirmed, okay, is an association. What I'm saying is that you would tend then to associate, let's say a Sunway named project, because you say likely to be a Sunway project, therefore you tend to associate that project with Sunway, correct?
MICHAEL	Yes.

CKY	Therefore, if the Sunway Residence, which is built on a hill, collapsed okay?
MICHAEL	Okay.
CKY	I would be under the impression that it's a Sunway project that has collapsed because of my early impression, do you agree with me? Because I didn't check, because I'm not interested to buy, so I didn't check, correct?
MICHAEL	But the.
CKY	No. Just answer me, that is very simple.
MICHAEL	Possibly only.
CKY	Possibly yes?
MICHAEL	Yes.

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CKY	So possibly, I would still may have believed that it's a Sunway project has collapsed, because I was under the impression. Yes, possibly? You agree?
MICHAEL	Right. Possibly. Agree, yes.

CKY	Okay, yes. Therefore, in a same way, you would agree with me that, if a project is named Ken something, okay? Example Ken City, there is a possibility that people would associate that project with the plaintiffs, based on all the analysis that we did, correct? You have to say yes, instead of nodding.
MICHAEL	Possibly only.
CKY	Possibly, yes that's what. So there's a possibility that people would associate that with the plaintiff, correct?
MICHAEL	Yes.
CKY	Okay. And there's a possibility that people with that impression, may not have decided to purchase Ken City, correct?
MICHAEL	Correct.

CKY	Correct. And if something negative and bad happens to Ken City, like collapse, or not built it to specifications, have a lot of trouble, you know? There is a possibility that the person who believed that, that project belongs to the plaintiff, would also then have the impression that Ken City has been developed poorly, agree?
MICHAEL	No.
CKY	Take you back one step, because you earlier said already that, yes, if I didn't proceed to buy Ken City, there's a possibility that I will continue to believe that, that project is associated with the plaintiff, yes?
MICHAEL	Yes.
CKY	You already confirmed that, yes? Therefore, my next question is, it's very logical yes? So if something happens to that project, because you were under that belief that it is associated with the plaintiffs, right? If something happens to the project, collapse?
MICHAEL	Yes.

[105] Based on the above reasons, I am of the view that the plaintiffs have established evidence of confusion arising from the defendants' used of the mark 'KEN'.

MALA FIDE

[106] The plaintiffs also contended that the first defendant had deliberately used 'Ken City' in its advertisement in a manner that would allow them to ride on the goodwill and reputation of the plaintiffs.

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[107] In fact, it is clear that DW1 admitted during cross-examination that he needed to use 'KEN CITY' to gain more publicity for his project. This is what DW1 said:

CKY	And would you agree with me that you in fact could go on with the development of D'Pines because you don't need the name Ken City which.
FOO	I, I cannot sell.
CKY	Why couldn't you sell, you need the Ken City name to sell?
FOO	I don't have the publicity.
CKY	Precisely.
FOO	I don't, I don't advertise.
CKY	Yes, precisely, you need that for more height, yes? For people to take notice of your advertisement, correct.
FOO	Yes.

CKY	Well I put it to you that you have just stated earlier that you needed the publicity, you needed to sell.
FOO	Yes.

[108] It emerged from the evidence of DW1 that the first defendant is aware of the existence of the goodwill of the plaintiffs and thus I accept the submission of the plaintiffs that the first defendant has intention to ride on their goodwill in the mark in the property development industry.

DAMAGES

[109] Case law shows that if goods or services offered by both parties in a passing off action are in *direct competition with one another*, the court would readily infer the likehood of damage to a claimant's goodwill. There is no need to prove actual damage.

[110] In *Seet Chuan Seng v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770 at p 782 (the Supreme Court held that in an action for passing off, where the goods in question are in direct competition with one another, the court will readily infer the likelihood of damage to the plaintiffs' goodwill through loss of sales and loss of exclusive use of his name (see also *Sinma Medical Products (M) Sdn Bhd v Yomeishu Seizo Co Ltd & Ors* [2004] 4 MLJ 358).

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[111] In *Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor* Ramly Ali J (as he then was) said at pp 301 and 302:

> It is also settled law that actual damage need not be proven A probability of damage is sufficient.
>
> There are various heads of damages but the generally recognised heads of damage could be labeled in two way which are destruction and diversion. In the first case (destruction), the goodwill is destroyed, damaged or depreciated. In the second case (diversion), the goodwill as such may not initially be damages to any measurable extent, but the plaintiff is just as certainly deprived of its benefit the attractive force which the goodwill may draw in custom as powerfully as before, but draw it to the first defendant instead of the plaintiffs.
>
> In the present case, the plaintiffs have shown both losses. Firstly, there is the possibility of misappropriation of the goodwill and commercial advantage enjoyed by the plaintiffs in relation to products bearing the 'TAMIN' trademark in the sense that exclusivity to 'TAMIN' is lost. Secondly, if the products of the first defendants do not meet up to the quality associated with the plaintiffs' products, the trade and public would associate such lack of quality to the plaintiffs.
>
> In looking at the heads of damages, the evidence clearly shows that the acts of the first defendants would lead to damages to the plaintiffs. The first defendants by employing the 'TAMIN' trademark in relation to their goods are clearly taking an unfair advantage out of the goodwill and reputation of the plaintiffs.

[112] In the present case, both the plaintiffs and the first defendant are engaged in a common field of activity namely property development and construction. As such based on the authorities cited above, the likelihood of damage to the plaintiff will be readily inferred.

[113] With regards to issue of damages, counsel for the plaintiffs submitted that if the defendants were allowed to continue to use any mark containing the word 'KEN CITY' to promote their development projects, it will cause harm to the plaintiffs. If the defendants development project is of an inferior quality or if there are any incidents of abandon projects, the plaintiffs' reputation would be ruined. According to the plaintiffs, this is a well-known issue in the property development industry as shown in the articles on abandoned housing projects. The plaintiffs' are particularly concerned especially when the first defendant has a bad track record as a property developer in Malaysia as shown in reported cases against them.

[114] In this regard, the plaintiffs adduced evidence during the trial that the first defendant was ordered by the Court of Appeal in 2007 to pay damages to 39 owners of houses in Taman Nirwana Phase 2, Ampang for not building the houses according to the agreed plans and specification. Further, 74 owners of the City Garden Palm Villa Condominium developed by the first defendant

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had filed for leave to apply for committal proceedings against the first defendant and its seven directors for failure to adhere to a court order obtained by the said owners on October 2011. The court order was for an injunction restraining the first defendants from interfering with the owners' peaceful and lawful occupation of their properties and enjoying the facilities.

[115] In my view, based on the evidence of PW2 that the property market is a niche market where reputation of a developer is importance and fortified by the fact that the first defendant has a bad track record as a property developer in Malaysia as shown in the reported cases against them, the probability of damage to the plaintiffs goodwill/business are convincing.

[116] For the above reasons, I am satisfied that the defendants had passed off themselves as associated with to the plaintiffs by using the trademark 'KEN CITY'.

THE DEFENDANTS' COUNTERCLAIM

[117] The first defendant counterclaims against the first plaintiff for defamation and unlawful interference due to the letters written by the first plaintiff to the authorities namely, JPN and MPAJ.

[118] The defendants alleged that the plaintiffs have published the following letters which are defamatory:

	Letters	Date	Page
(a)	Letter to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar (Nik) Bin Abu Bakar	5 July 2011	907A and 907B, bundle B4
(b)	Letter to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar (Nik) Bin Abu Bakar	27 July 2011	921, bundle B4
(c)	Letter to Ministry, Licensing and Advisory Council Unit (Putrajaya). This letter was carbon copied to MPAJ and addressed to Yang Berbahagia Dato' Mohammed Bin Yaacob	14 November 2011	1691 to 1691B, bundle B6
(d)	Letter to Ministry, Licensing and Advisory Council attentioned to Khairul Azhar (Nik) Bin Abu Bakar	6 December 2011	1693 to 1695, bundle B6
(e)	Letter to Ministry (Putrajaya) attentioned to Yang Berbahagia Dato' AbuBakar Bin	6 December 2011	1696, bundle B6
(f)	Letter to Ministry, Enforcement Unit (Putrajaya), attentioned to Muhammadin Bin Mohd Taib	6 December 2011	1697, bundle B6

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letters addressed To MPAJ

	Letters	Date	Page
(a)	Letter to MPAJ addressed to Yang Berbahagia Dato' Mohammed Bin Yaacob	6 July 2011	908, bundle B4
(b)	Letter to MPAJ attentioned to Nizam Bin Sahari	6 December 2011	Loose sheet, exh 'P13'

[119] Learned counsel for the defendants submitted that the defamatory statements published by the first plaintiffs are as follows:

	Defamatory Statements	Letters	Pages
(a)	CONFUSION OF D'PINES @ AMPANG AS A DEVELOPMENT OF THE KEN HOLDINGS Bhd GROUP	(i) Letter dated 5 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar ('Nik') Bin Abu Bakar;	907A and 907B, bundle B4
		(ii) Letter dated 27 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar ('Nik') Bin Abu Bakar	921, bundle B4
(b)	We are very surprised that they are able to use this name as firstly, their development company is Sri Seltra Sdn Bhd and has nothing to with KEN CITY. The development name is D'Pines @ Ampang and also has nothing to do with KEN CITY	(i) Letter dated 5 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar ('Nik') Bin Abu Bakar;	907A and 907B, bundle B4
		(ii) Letter dated 27 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar ('Nik') Bin Abu Bakar	921, bundle B4
		(iii) Letter dated 6 July 2011 to MPAJ addressed to Yang Berbahagia Dato' Mohammed Bin Yaacob	908, bundle B4

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(c)	We strongly object to their use of 'KEN CITY and are very concerned as to the potential confusion it will create for the homebuyers.	(i) Letter dated 5 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar ('Nik') Bin Abu Bakar;	907A and 907B, bundle B4
		(ii) Letter dated 27 July 2011 to Ministry, Licensing and Advisory Council Unit (Kuala Lumpur) attentioned to Khairul Azahar (Nik) Bin Abu Bakar	921, bundle B4
		(iii) Letter dated 6 July 2011 to MPAJ addressed to Yang Berbahagia Dato' Mohammed Bin Yaacob	908, bundle B4
(d)	CONFUSION OF D'PINES @ AMPANG BY USING THE NAME 'KEN CITY' AS A DEVELOPMENT OF THE KEN HOLDINGS BHD GROUP	(i) Letter dated 14 November 2011 to Ministry, Licensing and Advisory Council Unit (Putrajaya). This letter was carbon copied MPAJ and addressed to Yang Berbahagia Dato' Mohammed Bin Yaacob	1691 to 1691B, bundle B6
		(ii) Letter dated 6 December 2011 to Ministry (Putrajaya) attentioned to Yang Berbahagia Dato' AbuBakar Bin Hassan	1696, bundle B6
		(iii) Letter dated 6 December 2011 to Ministry, Enforcement Unit (Putrajaya), attentioned to Muhammadin Bin Mohd Taib	1697, bundle B6

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(e)	It is to our utmost surprise that they have again placed another advertisement, this time in both StarBiz and Berita Harian-Ekonomi on the 11th November 2011 again indicating 'KEN CITY', when it has nothing to do with their development company, Sri Seltra Sdn Bhd or the development D'Pines @ Ampang.	Letter dated 6 December 2011 to Ministry (Putrajaya) attentioned to Yang Berbahagia Dato' Abu Bakar Bin Hassan	1696, bundle B6
(f)	CONFUSION OF 'KEN CITY SQUARE' BY USING THE NAME 'KEN CITY' AS A DEVELOPMENT OF THE KEN HOLDINGS BHD GROUP	(i) Letter dated 6 December 2011 to Ministry, Licensing and Advisory Council (Putrajaya) attentioned to Khairul Azhar (Nik) Bin Abu Bakar	1693, bundle B6
		(ii) Letter dated 6 December 2011 to Ministry (Putrajaya) attentioned to Yang Berbahagia Dato' AbuBakar Bin Hassan	1696, bundle B6
(g)	The use of the name/logo 'KEN CITY' by the developer Sri Seltra Sdn Bhd has created confusion for the homebuyers and we strongly object to their use of the name/logo 'KEN CITY'.	Letter dated 6 December 2011 to Ministry (Putrajaya) attentioned to Yang Berbahagia Dato' AbuBakar Bin Hassan	1696, bundle B6

(the defamatory statements).

[120] Thus, the defendants submitted that those words or statements in the letters, by way of innuendo, mean that:

(a) Sri Seltra deliberately conducted the advertising or promotion of the D'Pines @ Ampang Project in an improper and illegitimate manner;

(b) Sri Seltra attempted to ride on the first plaintiff's alleged goodwill and reputation;

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(c) Sri Seltra attempted to take unfair advantage of the first plaintiff's alleged goodwill and reputation;

(d) Sri Seltra intentionally misled the public to increase its sales;

(e) Sri Seltra misrepresented to the public that D'Pines @ Ampang Project is one of the development projects of the plaintiffs;

(f) Sri Seltra is:

(i) unethical;

(ii) dishonest;

(iii) deceitful;

(iv) mendacious;

(v) untrustworthy;

(vi) malicious; and

(vii) lying;

(g) Sri Seltra employed underhanded tactics in advertising or promoting the D'Pines @ Ampang Project; and

(h) Sri Seltra is envious and jealous of the first plaintiff's alleged goodwill and reputation in housing development industry.

[121] Further, the defendants submitted that the defamatory statements are capable of bearing a defamatory meaning because they have a tendency to harm the first defendant by lowering the first defendant in the eyes of right thinking members of the public.

[122] To determine whether the defamatory statements are defamatory, learned counsel for the plaintiffs referred to the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371, where the Court of Appeal held at pp 374 and 375 that:

> *do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.*
> …
>
> Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent

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> upon the circumstances of the particular case. In England, libel actions are tried by judge and jury and the question is left for the jury to determine. However, *in this country, libel actions are tried by a judge alone, he is the sole arbiter of questions of law as well as questions of fact. He must, therefore, make the determination.* In the present instance, it is quite apparent that it is as a matter of pure fact that the article defames the appellant. It literally calls him a cheat and a liar. There can, in my opinion, be no dispute that the appellant was in fact libelled. I am, therefore, unable to agree with the opposite conclusion arrived at by the learned judge who tried the action. (Emphasis added.)

[123] It is the plaintiffs' defence that the letters were merely letters of enquiries and it was written on an occasion of qualified privilege and the statements in the letters were true.

[124] I have carefully perused the letters dated 5 July 2011, 27 July 2011 and 6 July 2011 and it clearly shows that the first plaintiff was merely enquiring from the authorities whether the first defendant had obtained the necessary approval for their advertisement in the *Star* newspaper on 17 June 2011 and for their brochure, banner and bunting. In fact JPN had also replied through their letter dated 14 July 2011 and 19 September 2011 confirming that the first defendant had not received the necessary approval for the *Star* advertisement as well as the brochure, banners and buntings containing the word 'KEN CITY'.

[125] Thus, in my view, the first plaintiff wrote those letters to make enquiries and/or complaint to the authorities regarding the acts of the defendants.

[126] Similarly, in *Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor* [2006] 5 MLJ 262 at pp 308 and 309:

> The court are of the view that the plaintiffs were clearly within their legal limits to make the complaint and enforce their rights under the law.' 'This being the case, it is clear that the statements made by the plaintiffs to the enforcement division were true and thus the claim by the defendants of slander must necessarily fail. There is no issue of disparagement clearly because the plaintiffs' statements were true. Denigration does not arise and the plaintiffs are well within their rights to complain to protect and preserve their rights. As a matter of fact, the complaint of the plaintiff was independently evaluated by the enforcement division an even they held the position that the plaintiff's complaint was well founded and legitimately made.

[127] In the light of the above authorities, there is no merit in the defendants' claim for defamation.

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MALICE

[128] The first defendant claims that the first plaintiff has acted with malice by writing a few letters to the authorities and repeating the purported defamatory statement.

[129] The plaintiffs contended, and I accept that each letter written by the first plaintiff to the authorities has a different purpose as shown below:

(a) the letter dated 5 July 2012 is to enquire whether JPN had given approval to the first defendant to advertise the *Star* advertisement enclosed that contains 'KEN CITY';

(b) the letter dated 27 July 2012 is to enquire whether JPN had given approval to the first defendant to use 'KEN CITY' in their brochure, banner and bunting for the D'Pines Project;

(c) the letter dated 9 December 2011 is to seek confirmation from JPN on certain draft advertisements; and

(d) the letter dated 6 July 2012 is to enquire another authority ie MPAJ whether they had given approval to the first defendant to use 'KEN CITY' for the D'Pines Project.

[130] In this context, there were written replies by JPN on 14 July 2011 and 19 September 2011 and 12 December 2011 to the letters which states that the first defendant has obtained the necessary approvals and the matter will be investigated pursuant to reg 5(1) of the Housing Development (Control and Licensing) Regulations 1989.

[131] Hence, in the light of the above reasons, I find that there is no defamatory statement in any of those letters from the plaintiff. Thus, the first defendant failed to prove that there is any malice on the part of the first plaintiff.

[132] The first plaintiff should not be faulted as their letters were written merely for the purpose of enquiries and to protect their rights. In the case of *Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor* [2006] 5 MLJ 262 at p 309, the court said:

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A On the other hand, on the evidence of PW1, it is clear that the complaint was made on the basis of protecting what the plaintiffs have always believed to be a legitimate right that they possess. This is supported by the consistent position that the plaintiffs have taken since the making of the complaint which includes the filing of this suit to protect their rights.

B

[133] Since the evidence shows that the 1 defendant did not obtain the necessary authorities' approval, the defendants now cannot claim that the first plaintiff is malicious because it wrote letters to the authorities.

C **[134]** Hence, the counterclaim on malice also fails.

UNLAWFUL INTERFERENCE

D **[135]** The tort of unlawful interference arises when one person using unlawful means with an object of causing damage to another (see *Merkur Island Shipping Corpn v Laughton* [1983] 2 AC 570 (HL) at p 606 (Auth 31 PBOA); *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297 at p 343 (Auth 32 PBOA).

E

[136] Based on the facts and circumstances of this present case, in my view there is no unlawful interference as the first plaintiff did not use any unlawful means against the first defendant. As I have stated earlier, the first plaintiff was merely writing letters of enquiries to the authorities and has no intention to
F cause any damage to the first defendant. Any action taken by JPN was on their own accord and was not caused by the first plaintiff.

CONCLUSION

G **[137]** For the reasons set out above, the plaintiffs' claim is allowed with costs.

[138] Accordingly, the defendants' counterclaim is dismissed with costs to the plaintiffs.

H **[139]** Parties will submit further on the issue of costs.

I

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Plaintiffs' claim allowed and defendants' counterclaim dismissed with costs.

Reported by Kanesh Sundrum